

In the Matter of

WC Docket No. 16-363

HD Tandem² hereby files its opposition in response to the Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges (“Petition”) in the above-referenced proceeding.

In the guise of a petition for forbearance under 47 U.S.C. § 160(c), AT&T urges the Federal Communications Commission (“Commission”) to engage in further rulemaking as part of the Commission’s efforts to reform the regulatory regime for intercarrier compensation. Specifically, AT&T wants the Commission to undertake certain steps relating to issues that the agency identified in the *USF/ICC Transformation Order*³ as issues that might be considered as part of future rulemaking efforts in that proceeding.⁴ Rather than filing a petition for rulemaking

⁴ AT&T Services, Inc., Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363 (filed Sept. 30, 2016) (Petition) at 3 (stating “AT&T thus urges the Commission to act with urgency and finish the intercarrier compensation reforms that it years ago concluded were vital” and stating “the

or an *ex parte* presentation urging action by the Commission (either of which would have been an appropriate means for addressing the issues AT&T seeks to address), AT&T filed a petition for forbearance under 47 U.S.C. § 160(c). AT&T did so presumably because the forbearance procedure imposes a deadline for Commission action while a petition for rulemaking or *ex parte* presentation does not. In addition to urging the Commission to engage in further rulemaking (rather than forbearance), AT&T has failed to meet its burden as petitioner of proving that the standards mandated by the statute have been met.

The Commission should not permit any party to abuse the forbearance procedures for the purpose of imposing a deadline on agency action or securing desired relief by default through agency inaction. The procedural protections mandated for rulemaking proceedings are critical for ensuring that the FCC's rules serve the public interest and do not cause unintended consequences. By contrast, the mandatory forbearance procedures generally focus on whether *competition* has made specific requirements unnecessary such that forbearance would foster even more competition. For these reasons, the Commission should promptly issue a decision that the

Commission ... should promptly issue new rules to address the remaining inefficiencies and arbitrage activities in its hybrid intercarrier compensation system.”). *See also, for example, USF/ICC Transformation Order* at ¶¶ 817-18 (stating “[w]e find that originating charges also should **ultimately** be subject to the bill-and-keep framework.... Notwithstanding this conclusion, we take immediate action to cap all interstate originating access charges and intrastate originating access charges for price cap carriers. Although we do not establish the transition for rate reductions to bill-and-keep in this Order, **we seek comment in the FNPRM on the appropriate transition and recovery mechanism for ultimately phasing down originating access charges**” (emphasis added)); *id* at ¶ 1297 (stating “[t]oday, we adopt a bill-and-keep pricing methodology as the default methodology that will apply to all telecommunications traffic at the end of the complete transition period...Although we specify the implementation of the transition for certain terminating access rates in the Order, we did not do the same for other rate elements, including originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching. In this section, we seek further comment to complete our reform effort, and establish the proper transition and recovery mechanism for the remaining elements... We agree, and seek to reach the end state for all rate elements as soon as practicable, but with a sensible transition path that ensures that the industry has sufficient time to adapt to changed circumstances. **As a result, we seek comment on transitioning the remaining rate elements consistent with our bill-and-keep framework, and adopting a new recovery mechanism to provide for a gradual transition away from the current system**” (emphasis added)); *id* at ¶ 820 (stating “[u]ltimately, we agree with concerns raised by commenters that the continuation of transport charges in perpetuity would be problematic... **We therefore seek comment on the appropriate treatment of, and transition for, all tandem switching and transport rates in the FNPRM**” (emphasis added)); *id* at ¶ 821 (stating “we note that the transition set forth above caps rates but does not provide the transition path for all rate elements or other charges, such as dedicated transport charges. In our FNPRM, **we seek comment on what transition should be set for these other rate elements and charges as part of comprehensive reform, and how we should address those elements**” (emphasis added)); *id* at 828 (stating “the FNPRM seeks comment on the appropriate long-term implementation framework, **including whether even the transitional role for tariffing should be replaced**, with carriers relying solely on interconnection agreements” (emphasis added))).

Petition fails to meet the standards for forbearance under Section 10(a) of the Communications Act of 1934, as amended, (the "Act"), which is codified at 47 U.S.C. § 160(a).

A. AT&T has not met, and could not meet, its burden with respect to any of the prongs of the statutory forbearance standard.

Section 10(a), creates a process for forbearing from regulations that are no longer necessary due to competition and for which forbearance would enhance competition. Specifically, Section 10(a) of the Communications Act of 1934, as amended, states that the FCC “shall forbear from applying any regulation or any provision of this [Act] ... to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services” if the FCC determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.⁵

The petitioner has the burden of proof for demonstrating that all three statutory requirements have been fully satisfied before the Commission may grant a petition for forbearance.⁶ AT&T has failed to meet its burden.

⁵ 47 U.S.C. § 160(a)(1)-(3).

⁶ *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, 18 FCC Rcd. 24648, 24658 ¶ 24 (2003) (stating that in pursuing relief through a petition for forbearance, “the Petitioner [has] ... the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards” and rejecting the petitioner’s claim that its burden in a forbearance petition is lower than that of a waiver petition). *See also Policy and Rules Concerning the Interstate Interexchange Marketplace*, 14 FCC Rcd. 391, 405 ¶ 28 (1998) (denying a petition for forbearance because the “petitioners have not met their burden with respect to the first and second prongs of the forbearance standard.”); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, 15 FCC Rcd 7066, 7070 ¶ 7 (stating that a petitioner “must explain” benefits of forbearance); *see also In re Core Commu'ns., Inc.*, 455 F.3d 267 (D.C. Cir. 2006), *quoting Cellular Telecomms. & Internet As 'n v FCC*, 330 F.3d 502, 509 (D.C. Cir. 2001) (“[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is

First, even if the elimination of tariffing could address the pricing practices of which AT&T complains, AT&T nonetheless has failed to demonstrate that tariffing:

- is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- is not necessary for the protection of consumers; and
- is not consistent with the public interest.

AT&T is required by statute and the FCC's implementing rules separately to meet its burden of proof with respect to these factors, even if eliminating tariffs would potentially correct the practices of which it complains. Specifically, AT&T has the burden of proving that tariffing is not necessary with respect to any charge or practice, even if eliminating tariffing would fully address the practice of which AT&T complains.

Tariffs ultimately could prove to be an effective means for investigating and, to the extent necessary, correcting unjust and unreasonable pricing practices -- including not only the pricing practices of which AT&T complains, but also with respect to all other charges and practices. As such, tariffing will continue to be "necessary for the protection of consumer" until the Commission adopts additional regulations, which it cannot do in response to a forbearance petition. Because AT&T has not even attempted to make the required demonstration with respect to the first two prongs, AT&T has not met its burden for proof.

Second, the elimination of tariffing would not resolve the pricing practice of which AT&T complains. For example, absent additional regulations, pricing disputes would continue in the absence of tariffs. Specifically, the mere elimination of tariffing would say nothing about the right of a terminating carrier to recover its costs from originating carriers, and pricing disputes would continue. Indeed, AT&T admits in the *Petition* that it wants the Commission to impose additional requirements to "continue" the process it started in the *USF/ICC Transformation*

unsatisfied."); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 5C 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415 (2005) ¶ 16 (rejecting petition for forbearance because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria) (appeal denied *Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205 (3d Cir. 2007)); appeal dismissed in part and denied in part *Qwest Corp. v. F.C.C.*, 482 F.3d 471 (D.C. Cir. 2007)).

Order.⁷ Since detariffing -- in the absence of new rules -- would have little to no impact on the pricing practices of which AT&T complains (absent unlawful self help), and yet more rigorous enforcement of the rules that apply to tariffs could protect consumers even if no new rules are adopted, AT&T has failed to meet its burden with respect to forbearance. In short, grant of the relief AT&T requests would not address the pricing practices of which AT&T complains -- and it would eliminate a potential tool for addressing those pricing practices -- therefore grant of the Petition would not be consistent with the public interest.

B. AT&T failed to demonstrate that the requested forbearance would promote competitive market conditions.

In ruling on a forbearance petition, the FCC must consider whether forbearance from enforcing the regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. Specifically, Section 10(b) provides in relevant part as follows:

In making the [public interest] determination under subsection (a)(3), the Commission *shall* consider whether forbearance from enforcing the provision or regulation will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers of telecommunications services.⁸

(Emphasis added). AT&T has failed to provide any evidence to demonstrate that detariffing would enhance competition among telecommunications providers, or that competition would eliminate the pricing practice of which AT&T complains.

The presence or absence of competition actually has little to no impact on the pricing practices of which AT&T complains. The pricing practices of which AT&T complains are possible due to the relationship between the called party and the carrier serving the called party.

⁷ See note 4. See also AT&T Services, Inc., Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363 (filed Sept. 30, 2016) (Petition) at 11 (stating “reform of originating access charges is important to prevent further proliferation of such arbitrage activities” and stating “[t]he Commission *should promptly act to set the transition for the remaining intercarrier compensation charges, and to revise its existing rules* to allow competition to discipline intercarrier compensation” (emphasis added)); *id* at 26 (stating “*the Commission should take prompt action to complete intercarrier compensation reform*” (emphasis added)).

⁸ 47 U.S.C. § 160(b).

Although competition provides called parties with additional choices, the presence or absence of competition would have no impact on the pricing practices that AT&T has targeted. Indeed, if AT&T's claims about the incentives created by profit sharing were true (which they are not), then more competition combined with the elimination of tariffing could lead to even higher termination rates (*e.g.*, carriers could compete by offering to share higher revenues with called parties) unless the FCC adopted additional regulations, which cannot be done using the statutory forbearance process. Finally, there has been no credible suggestion that the detariffing requested by AT&T would enhance competition.

C. Forbearance is the wrong procedural tool for addressing the pricing practices discussed in the Petition.

Regardless of whether tariffs are the right tool to address the pricing practices of which AT&T complains, a statutory forbearance proceeding is not the right means for adopting new regulations or continuing the work of that the Commission started in the *USF/ICC Transformation Order* as AT&T explicitly requests in the Petition. The statutory forbearance process is not designed to consider the potential benefits or unintended consequences of imposing new requirements or regulations -- which is what AT&T is really requesting here -- since the focus of a forbearance proceeding is whether competition has made a particular requirement unnecessary.

To the extent the pricing practices of which AT&T complains need to be addressed, the Commission should seek public comment on the issue and, if warranted, propose responsive rules. However, the Act does not permit the forbearance process to be abused for the purpose of impose a deadline on the Commission for completing the statutory process for adopting the type of rules and requirements that AT&T seeks.

II. CONCLUSION

For the reasons explained in this opposition, the Commission should promptly issue a decision concluding that the *Petition* fails to meet the standards for forbearance under section 10(a) of the Act.

Respectfully submitted,

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